

JOHN BROWN; LISA FAGAN; MICHAEL
FAGAN; JEFFREY FORDE; MICHAEL
MORGAN; JOSHUA PAWELEK; and JOHN
STOEHR, as individuals and on behalf of all
others similarly situated,

Plaintiffs,

v.

HARTFORD HEALTHCARE CORPORATION

Defendant.

: DOCKET NO. X03-HHD-CV22-6152239-S

:

: SUPERIOR COURT

:

: COMPLEX LITIGATION DOCKET AT

: HARTFORD

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: March 13, 2023

FILED

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HARTFORD J.D.

**APPLICATION OF THE STATE OF CONNECTICUT OFFICE OF THE
ATTORNEY GENERAL FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

With the consent of the parties, the State of Connecticut, acting through Attorney General William Tong, (“State”), respectfully applies for permission to file a brief as *amicus curiae* for the limited purpose of addressing Conn. Gen. Stat. § 35-46a, the 2018 amendment to the Connecticut Antitrust Act, Conn. Gen. Stat. §§ 35-24 et seq. (also known as the Connecticut Antitrust Act’s “*Illinois Brick* repealer” or “Indirect Purchaser Law”) as it relates to an injured party’s standing. The State conditionally files its *amicus* brief attached to this application. In support of this application, the State presents as follows:

I. NATURE OF THE APPLICANT’S INTERESTS

The Attorney General is a constitutional executive officer of the State who has “general supervision over all legal matters in which the state is an interested party.” Conn. Const., Amend. 1; Conn. Gen. Stat. § 3-125. He is “entrusted with broad duties as [the State’s] chief civil law officer and . . . he must, to the best of his ability, fulfill his ‘public duty, as Attorney General, and his duty as a lawyer to protect the interest of his client, the people of the State.’” *Connecticut Com. on Special Revenue v. Connecticut Freedom of Information Com.*, 174 Conn. 308, 318-19 (1978). One

of his statutory duties is to enforce the Connecticut Antitrust Act (“CT Antitrust Act”).¹ See Conn. Gen. Stat. § 35-32. In carrying out this duty, the Attorney General is authorized to bring actions under the CT Antitrust Act in both the name of the State and on behalf of its citizens as *parens patriae*. See Conn. Gen. Stat. § 35-32. In his capacity as *parens patriae* specifically, the Attorney General may bring actions in the name of the State on behalf of persons residing in the state with respect to damages they have sustained, which would include damages as an indirect purchaser.² See Conn. Gen. Stat. § 35-32(c)(1). The Attorney General also may seek recovery on behalf of the State for, *inter alia*, treble damages that results in injury to the State’s business or property. See Conn. Gen. Stat. § 35-35.

Through enforcement actions under § 35-32(c) and § 35-35, the Attorney General and the State benefit from the Indirect Purchaser Law, Conn. Gen. Stat. § 35-46a, as it prevents defendants from successfully asserting a “defense that the defendant did not deal directly with the person” who brought the action, but also permits that defendant to prove certain defenses “to avoid duplicative liability.” See Conn. Gen. Stat. § 35-46a. The Attorney General’s ability to bring actions and recover damages, on behalf of the State and its people, against those who have caused antitrust harms would be significantly diminished if defendants were allowed to assert that under the CT Antitrust Act indirect purchaser standing is to be analyzed pursuant to contrary federal caselaw that forecloses indirect purchasers from bring suit under the Sherman Act. Such an outcome would defeat one of the main goals of the CT Indirect Purchaser Law.

¹ Connecticut General Statutes §§ 35-24 to 35-46a.

² The Attorney General is also authorized to bring *parens patriae* actions to recover “damages to the general economy of the state or any political subdivision.” See Conn. Gen. Stat. § 35-32(c)(2).

II. LEGAL GROUNDS SUPPORTING THIS APPLICATION

The Connecticut Supreme Court has endorsed the practice of a nonparty obtaining the trial court's permission prior to the filing of an amicus brief in the Superior Court. *See Thalheim v. Greenwich*, 256 Conn. 628, 646 (2001).³ "The appearance of an amicus curiae is generally authorized by the court's grant of an application for the privilege of appearing as amicus curiae and not as of right. The fact, extent and manner of an amicus curiae's participation is entirely within the court's discretion and an amicus curiae may ordinarily be heard only by leave of the court." *Id.* at 644. Accordingly, the superior court may grant permission to file an amicus curiae brief if the information provided is "timely, useful or otherwise necessary, to the administration of justice." *Id.* at 645 (Internal quotation marks omitted) quoting 4 Am. Jur.2d, Amicus Curiae § 3 (1995).

III. REASONS TO PERMIT THE STATE TO FILE AN AMICUS CURIAE BRIEF

Plaintiffs brought suit under the CT Antitrust Act and the Connecticut Unfair Trade Practices Act ("CUTPA") alleging that the anticompetitive conduct and deceptive or unfair practices of Defendant Hartford Healthcare Corporation ("HHC") resulted in their paying inflated prices for healthcare goods and services. In moving to strike or dismiss Plaintiffs' second amended complaint, Defendant HHC relies on federal caselaw to argue that Plaintiffs do not have standing under the CT Antitrust Act to bring suit because they have failed to allege an antitrust injury and they are not efficient enforcers of the act. But the Connecticut Legislature enacted the Indirect Purchaser Law, § 35-46a, specifically to amend the CT Antitrust Act following the Supreme Court's decision in *Illinois Brick* and allow indirect purchasers—those who "are two or more steps removed from the violator in a distribution chain"—to recover damages under the Sherman Act.

³ Although the Practice Book contains no relevant provisions for use in the Superior Court, guidance is found in Section 67-7 of the Rules of Appellate Procedure, which sets forth the general requirements governing applications for permission to appear as amicus curiae on appeal.

Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520 & n.1 (2019); *see Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977). In doing so, the General Assembly necessarily intended to address the effects of other federal cases that also foreclose the ability of indirect purchasers to recover damages sustained from a violator under the Sherman Act. *See Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 539 (1983). Otherwise, its efforts would have been superfluous. Indeed, the entire purpose of the CT Indirect Purchaser Law was to allow indirect purchasers, including the State and its municipal and local agencies and citizens, to seek and recover damages sustained from a violator under the CT Antitrust Act. *See* Testimony of then Atty. Gen. George Jepsen (Mar. 9, 2018), available at https://t.ly/GT_k; Floor Statement of then Rep. Tong (Apr. 24, 2018), available at <https://t.ly/U00W>.

To date, no Connecticut court has analyzed the CT Indirect Purchaser Law, § 35-46a. The proper interpretation and application of that statute is a central issue to Defendant HHC's motion to strike or dismiss Plaintiffs' second amended complaint. This Court's decision on this issue of standing as it relates to § 35-46a will substantially affect the public interest, the interest of the people of the State, and the State itself, because Defendant HHC's position, if adopted, would undermine the legislative intent, render § 35-46a meaningless, and leave indirect purchasers without a viable path to recover damages sustained from a violator in this context.

As a primary enforcer of the CT Antitrust Act, the Attorney General has a compelling interest in ensuring that Connecticut courts properly apply and interpret the CT Antitrust Act to deter anticompetitive conduct and promote competition in a manner that is consistent with legislative policy objectives as well as relevant judicial precedent. To that end, the Attorney General requests permission to file an amicus brief addressing why the Court should recognize that under the CT Antitrust Act indirect purchaser standing should not be analyzed under any federal caselaw that forecloses indirect purchaser suits and that Defendant HHC misplaces reliance on

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federal case law to argue otherwise.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court grant leave to file a brief as *amicus curiae*.

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Dated: March 13, 2023

STATE OF CONNECTICUT

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CERTIFICATION OF SERVICE

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